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SMALL BUSINESS ADMINISTRATION

13 CFR Parts 121 and 125

RIN: 3245-AG22

Small Business Subcontracting

AGENCY: U.S. Small Business Administration.

ACTION: Final rule.

SUMMARY: The U.S. Small Business Administration (SBA or Agency) is amending its regulations governing small business subcontracting to implement provisions of the Small Business Jobs Act of 2010. In particular, this rule adds a provision providing that for a “covered contract” (a contract for which a small business subcontracting plan is required), a prime contractor must notify the contracting officer in writing whenever the prime contractor does not utilize a small business subcontractor used in preparing its bid or proposal during contract performance. This rule also adds a provision requiring a prime contractor to notify a contracting officer in writing whenever the prime contractor reduces payments to a small business subcontractor or when payments to a small business subcontractor are 90 days or more past due. In addition, this rule clarifies that the contracting officer is responsible for monitoring and evaluating small business subcontracting plan performance. The rule also clarifies which subcontracts must be included in subcontracting data reporting, which subcontracts should be excluded, and the way subcontracting data is reported. The rule also makes changes to update its subcontracting regulations, including changing subcontracting plan thresholds and

referencing the electronic subcontracting reporting system (eSRS). Further, the rule adds a provision to the regulations which addresses subcontracting plan requirements and credit towards subcontracting goals in connection with multiple award multi-agency, Federal Supply Schedule, Multiple Award Schedule and government-wide acquisition indefinite delivery, indefinite quantity contracts.

EFFECTIVE DATE: This rule will be effective [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Dean Koppel, U.S. Small Business Administration, Office of Government Contracting, 409 Third Street, SW, 8th Floor, Washington, DC 20416, (202) 205-7322, dean.koppel@sba.gov.

SUPPLEMENTARY INFORMATION:

On October 5, 2011, SBA published in the Federal Register a proposed rule to implement provisions of the Jobs Act which pertain to small business subcontracting. 76 FR 61626. Section 1321 of the Jobs Act requires the SBA Administrator, in consultation with the Administrator of the Office of Federal Procurement Policy, to publish regulations establishing policies for subcontracting compliance, including assignment of compliance responsibilities between contracting offices, small business offices, and program offices.

The proposed rule called for a 60-day comment period, with comments to be received by SBA by December 5, 2011. SBA published a notice in the Federal Register on December 1, 2011, reopening the comment period for an additional 30 days, until to January 6, 2012. 76 FR 74749.

The proposed rule contained changes to SBA's size regulations (Part 121) and the regulations governing SBA's government contracting programs (Part 125). SBA received 105 written comments during the comment period. Many of these comments were lengthy and discussed numerous proposed amendments. SBA has made changes in this final rule in response to comments received to its notice of proposed rulemaking. With the exception of comments which are beyond the scope of this rule, or which did not set forth any rationale or make suggestions, SBA discusses and responds fully to all of the comments below.

Summary of Comments and SBA's Responses

Part 121

SBA received one comment on proposed § 121.404(g)(3)(ii), which added a provision permitting a contracting officer to require a subcontracting plan if a prime contractor's size status changes from small to other than small as a result of a size recertification. The commenter recommended adding that size status at time of contract award controls subcontracting plan requirements or clarifying how a subcontracting plan must change if a former small business subcontractor reclassifies. Section 121.404(g)(3)(ii) provides that recertification does not change the terms and conditions of a contract, including the requirement for a subcontracting plan, and otherwise size is determined at time of offer and will not change during performance. However, under the final rule a contracting officer has the discretion to require a subcontracting plan if size status changes as a result of recertification.

Part 125

The proposed rule revised § 125.3(a) to update the subcontracting plan thresholds, which were increased pursuant to the government-wide procurement program inflationary adjustments required by Section 807 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005. Pub. L. 108-375; see also 75 FR 53129 (Aug. 30, 2010). One commenter recommended removing the reference to “a public facility” in § 125.3(a) because the term is not defined in the Code of Federal Regulations. SBA does not adopt this comment. It is up to the contracting officer to determine whether the term applies to a particular acquisition. Further, this term comes from Section 8(d) of the Small Business Act, so removing it would require legislative action.

The proposed rule added § 125.3(a)(1) to define subcontract in order to clarify which subcontracts must be included when reporting on small business subcontracting performance. SBA received a number of comments on proposed § 125.3(a)(1). Many commenters supported SBA’s definition of a subcontract.

One commenter requested confirmation that the new definition of subcontract will be coordinated with existing definitions at Federal Acquisition Regulation (FAR) 19.701 and FAR 52.219-9. SBA agrees that it is important for SBA’s rules and the FAR to be consistent and notes that its rules will also be incorporated in the FAR after SBA’s regulations are finalized.

One commenter requested that SBA clarify how subcontracts to and by affiliates will be treated. SBA’s long-standing policy has been to count subcontracts by first-tier affiliates as subcontracts of the prime contractor. SBA has amended § 125.3(a)(1) to make this clear. SBA notes that the Subcontracting Report for Individual Contracts (ISR) (SF-294) and the Summary Subcontract Report (formerly the SF-295, now discontinued)

and their electronic equivalents in eSRS specifically state that subcontracts to affiliates are not included in the individual and summary reports.

One commenter recommended excluding bonds and all insurance from the definition of subcontract. The commenter noted that in the construction industry, prime contractors generally have established and ongoing relationships with sureties and insurance providers, and bond and insurance requirements are generally met through these relationships, so no real opportunity for small business exists in those areas. The commenter also noted that the government's requirements for bonds and insurance—specifically for construction contracts—normally preclude the use of small business concerns. Although SBA is sympathetic to this comment, SBA would need more information on the participation of small business concerns in these industries before excluding bonds and all insurance from the subcontracting base government-wide.

One commenter opposed excluding philanthropic contributions from the definition of subcontract. The commenter noted that on Department of Defense contracts, services provided to the prime contractor by Historically Black Colleges and Universities (HBCUs) are generally funded by a donation or grant rather than charged, and excluding such donations/grants undermines a prime contractor's ability to support such HBCUs. SBA disagrees. It is unclear how a philanthropic contribution could be counted as a subcontract and charged to the government.

One commenter recommended requiring transparency in calculating the subcontracting base, arguing that the prime contractor has too much discretion and there are no checks in place. SBA does not concur. By statute, the contracting officer is responsible for negotiating a subcontracting plan that maximizes small business

participation and for monitoring performance. SBA and contracting agencies also monitor subcontracting plan compliance through compliance reviews.

One commenter recommended requiring discrete subcontracting reports, rather than comprehensive reports, for all prime contracts of \$1 million or more. SBA notes that comprehensive plans are authorized by statute and that commercial plans are authorized by the FAR. In addition, the thresholds for subcontracting plan reports are set by statute.

Several commenters opposed the exclusion of utilities from the subcontracting base. One commenter argued that electricity and other utilities should be included in the subcontracting base because small business concerns may be licensed or otherwise equipped to provide these services. Another commenter suggested that the exclusion should be more specifically defined to exclude services that are not required municipal services such as those required under local franchise agreements. SBA has amended the rule to exclude utilities where no competition exists and thus no small business concern could have an opportunity to receive a subcontract. Specifically, SBA has amended the definition to exclude “utilities such as electricity, water, sewer and other services purchased from a municipality or solely authorized by the municipality to provide those services in a particular geographical region.” Another commenter argued that not including utilities in the subcontracting base causes an overstatement of the percentage of contracts given to small business. Subcontracting plans are required to the extent subcontracting possibilities exist. As stated above, SBA has amended the rule to clarify that utilities are only excluded to the extent there is no choice of provider.

One commenter recommended clarifying that the supplies or services provided under the agreement must be specific to the particular prime contract requirements in order for the agreement to be considered a subcontract. Specifically, the commenter believed it would be useful to clarify that an agreement to obtain supplies or services that are in the nature of commercial items and are used to support both commercial and government contracts would not be considered a “subcontract.” The commenter is further requesting clarification concerning whether subcontracting flowdown requirements apply to certain types of contracts. As the commenter notes, certain vendor agreements must be included in the subcontracting base for commercial plans because those plans are required to consider indirect costs. Further, FAR 52.219-9(j) addresses flowdown requirements in the context of commercial items. Consequently, we have declined to address this matter in the final rule.

One commenter recommended clarifying if the list of exclusions is exhaustive or illustrative. SBA agrees and has amended the rule to state that the list “includes but is not limited to.”

One commenter recommended clarifying whether vendors of commercial items are subcontractors for flow-down clauses. SBA has clarified that flow-down clauses apply to commercial item vendors, except when the subcontract is for a commercial item and the prime contract contains FAR clause 52.212-5 or 52.244-6. Under this scenario, the prime contractor is required to flow down FAR clause 52.219-8 but not the clause at 52.219-9; accordingly, no subcontracting plan is required from other than small subcontractors at any tier (see Federal Acquisition Streamlining Act of 1994, Pub. L. 103-355, and FAR 52.219-9(j), 52.212-5(e), and 52.244-6(c)).

One commenter requested clarification of whether contracts in connection with foreign military sales are subject to the subcontracting plan requirements of the Small Business Act and the FAR. Based on the proposed definition, which SBA is adopting, contracts in connection with foreign military sales are subject to the subcontracting plan requirements, unless this requirement is waived in accordance with the procuring agency's regulations. Specific questions concerning specific contracts should be directed to the contracting officer.

The proposed rule added § 125.3(a)(2) to explicitly authorize contracting officers to establish additional subcontracting goals in terms of total contract dollars. As explained in the proposed rule, contracting officers are already doing this, and when a prime contractor enters its subcontracting achievements (i.e., dollars) into eSRS, the system automatically calculates the percentage by both methods—that is, as a percentage of total subcontracting and as a percentage of total contract dollars. Thus, the contracting officer has the ability to compare achievements against the total contract dollars if desired. Several commenters supported SBA's proposal to allow contracting officers to set additional subcontracting goals in terms of total dollars.

One commenter opposed proposed § 125.3(a)(2), arguing that the change would result in the illusion that there are more subcontracting opportunities for small businesses than in fact exist. The commenter argued under some contracts more than 70% of total contract dollars are spent on personnel expenses related to salary and benefits, which are costs for which there are no subcontracting opportunities. However, the commenter noted that the contracting officer has the ability to compare achievements either way (percent of subcontracting dollars or percent of total contract dollars) because eSRS

automatically calculates percentage by both methods when prime contractors report achievements in whole dollars. Thus, SBA believes that contracting officers should have the discretion to set goals in terms of total contract dollars. Some contracting officers already set current goals in terms of total contract dollars, and as the commenter notes, the calculation is already available in eSRS. Contracting officers need to set realistic goals, taking into account the opportunity for subcontracting and the percentage of dollar value that accrues to personnel expenses. However, subcontracts for labor are counted towards the total dollar contract value. SBA does not want to limit contracting officer flexibility that benefits small businesses.

One commenter questioned whether under the amended rule, small business goals set in terms of percentage of subcontracting dollars would be evaluated in terms of percentage of total contract dollars. SBA notes that the goals still must be set in terms of percentage of subcontracting dollars, but can be set in terms of total contract dollars as well.

The proposed rule added § 125.3(a)(3) to define a history of unjustified untimely or reduced payments as three incidents within a 12 month period. SBA invited comments on the proposed definition, alternatives with supporting rationales, and/or comments on whether such judgments should be left to the discretion of the contracting officer. SBA received several comments on the proposed definition of a history of unjustified late payment. Some commenters recommended that the definition should look for patterns, as opposed to specific numbers. Others recommended defining it based on percentages, and others recommend establishing a dollar value threshold. Others asked SBA to define

when a payment that is late is unjustified. Some commenters argued that it should be left in the discretion of the contracting officer.

SBA has decided to retain the proposed definition of three payments in a twelve month period that are more than 90 days past due, after performance has occurred and the government has paid the prime contractor, where the late payment is unjustified. If a payment is late but it is justified in the opinion of the prime contractor, e.g., unacceptable or incomplete performance, then the late payment would be justified, and there would be no requirement to notify the contracting officer. On the other hand, if satisfactory performance by the subcontractor has occurred, the prime contractor has been paid by the government, and payment to the subcontractor is more than 90 days past due, the prime contractor owes the contracting officer an explanation, regardless of the dollar value of the contract. The statute stipulates that payment to a subcontractor after 90 days is unacceptable unless justified. Further, looking for patterns or percentages would overly complicate a fairly simple principle: if satisfactory performance has occurred and the prime has been paid, subcontractors must be paid within 90 days.

Additional Responsibilities of Large Prime Contractors

The proposed rule amended the introductory text of § 125.3(c)(1) to reflect the updated subcontracting plan thresholds, as discussed above. One commenter opposed changing the thresholds, arguing that the higher the thresholds, the less small business participation will occur because small businesses are not required to submit subcontracting plans. However, the thresholds are set by statute, and subcontracting plans require percentages that are realistic based on subcontracting opportunity.

One commenter recommended amending § 125.3(c)(1)(i) to require prime contractors to give at least 30% of contracts to small business subcontractors. SBA disagrees. Subcontracting plans are established based on small business subcontracting opportunity. It would be inefficient and unfair to establish thresholds that would apply to all contracts government-wide.

SBA proposed to amend § 125.3(c)(1)(iii) to provide that a prime contractor may not prohibit a subcontractor from discussing with the contracting officer any material matter pertaining to payment or utilization. Some commenters argued that the proposed change conflicts with the principle of privity of contract. SBA disagrees. The contracting officer will not take any action with respect to the subcontractor. Rather, the contracting officer can take action with respect to the prime contractor's performance, which is the purpose of the statutory provisions. Other commenters argued that the contracting officer will become the entry point for contract disputes between primes and subcontractors. SBA notes that the contracting officer cannot be a party to disputes between subcontractors and prime contractors but must be involved in evaluating prime contractors' performance.

SBA received several comments on proposed § 125.3(c)(1)(iv), which provided that when preparing its individual subcontracting plan, a prime contractor must decide whether or not to include indirect costs in the subcontracting base, for both goaling and reporting purposes. Some commenters argued that this change would be an administrative burden on contractors and would not further the goals of the program. In proposing this rule, SBA's intent was to memorialize current practice. As explained in the proposed rule, indirect costs must be included in a commercial plan to ensure

comparability between goals and achievements because companies with commercial plans file only a summary report, not an individual report. All contractors must include indirect costs in their summary subcontracting reports.

As discussed in the proposed rule, § 125.3(c)(1)(iv) is being amended to reflect current practice.

One commenter recommended providing a specific definition for “indirect cost” as it pertains to small business subcontracting plans and eSRS reporting. The commenter noted that the definition in FAR Part 2 is vague and does not work well in this context. SBA disagrees. For consistency, SBA uses the FAR definition. SBA notes that requests to change the FAR should be directed to the FAR Council.

SBA proposed to add § 125.3(c)(1)(v), providing that large prime contractors are responsible for assigning NAICS codes and corresponding size standards to subcontracts. In response to comments, SBA has amended proposed § 125.3(c)(1)(v) to clarify that in assigning NAICS codes to subcontracts, prime contractors should use the guidance in SBA’s regulations governing contracting officers’ assignment of NAICS codes to prime contractors, 13 C.F.R. 121.410. In addition, SBA has amended the regulation to clarify that prime contractors may rely on subcontractors’ electronic representations and certifications made in the System for Award Management (SAM) (or any successor system), provided the subcontract contains a clause similar to current FAR clause 52.204-8(d) which clearly provides that the subcontractor is representing its size or socioeconomic at the time of offer for the subcontract. However, SBA notes that SAM was created for firms that want to do business with the government as prime contractors, and some subcontractors may not want to enter data into SAM. As such, SBA has also

clarified that a prime contractor (or subcontractor) may not require the use of SAM (or a successor system) for size or socioeconomic representation for subcontracts.

One commenter recommended clarifying whether § 125.3(c)(1)(v) applies to all subcontractors or only to certified small business subcontractors. The commenter also inquired as to whether a list of applicable NAICS codes would be provided at the time of proposal request. The assignment of a NAICS code and size standard is required for subcontracts, since that forms the basis for the prime contractor's claim that it awarded a subcontract to a small business or an other than small business. The prime contractor must assign a NAICS code to the solicitation, so that the subcontractor can make a size or socioeconomic representation in connection with that offer for that subcontract. Size or socioeconomic status is determined as of the date of offer for the subcontract.

The proposed rule amended redesignated § 125.3(c)(1)(vi) (former § 125.3(c)(1)(iii)) to provide that all contractors whose reports are rejected, including those with individual contract plans and commercial plans as defined in FAR 19.701, will be required to make the necessary corrections and resubmit their reports within 30 days of receiving the notice of rejection.

One commenter recommended that the rule refer to eSRS "or the successor system," arguing that eSRS is being replaced by SAM. In response to the comment, SBA has added clarifying language to the regulation.

One commenter recommended allowing 60 days to correct a report. SBA disagrees. Thirty days should be sufficient. One of the reasons for the Jobs Act was the belief that contracting officers and prime contractors are not reporting or reviewing subcontracting accomplishments in a timely manner.

One commenter recommended adding specific consequences for a prime contractor's failure to submit timely or accurate required reports. SBA does not concur. It is difficult to establish concrete, universally applicable consequences for contracting officers and prime contractors. SBA believes that compliance by the contracting officer or prime contractor could be considered as part of the performance evaluation of either party, at the discretion of the evaluator.

One commenter recommended adding a provision addressing the frequency and nature of the subcontracting reports that must be submitted to the contracting officer. SBA notes that these issues are addressed in the FAR.

One commenter recommended fixing data input and error issues in the eSRS system so the necessary data for enforcement can be available. In response to this comment, SBA recommends that contracting agencies include data quality as part of the performance evaluation of employees.

One commenter recommended reviewing eSRS and the Federal Funding Accountability and Transparency Act (FFATA) Subaward Reporting System (FSRS) databases and eliminating duplicate reporting requirements. SBA notes that FSRS is the reporting tool required by FFATA, and eSRS serves a separate purpose—i.e., it is an electronic system for reporting subcontracting plan compliance required by the Small Business Act.

SBA received several comments on redesignated § 125.3(c)(1)(viii) (former § 125.3(c)(1)(v)), which requires pre-award written notification to unsuccessful subcontractor offerors. SBA notes that this is not a new requirement (see also § 121.411(b)). SBA is only moving this provision as a result of amending this section to

increase the subcontracting plan thresholds. One commenter argued that this rule creates an unnecessary administrative burden. The commenter noted that there is no specified tracking of compliance or listed consequence for failure to meet this requirement. SBA again notes that this notification is required by the current regulations. Further, this requirement is the only means to trigger any self-policing in the small business subcontracting community. The government may review compliance with this requirement as part of a compliance review.

Some commenters recommended clarifying the language: “for which a small business concern received a preference.” One commenter noted that the FAR neither allows nor requires prime contractors to give small business preference on solicitations. Another commenter asked whether this language referred only to when a small business receives the award, or to all subcontracts set-aside for small businesses. This language is in the existing regulations and refers to subcontract competitions where consideration for award was limited based on size or socioeconomic status.

Use of Subcontractor in Performance

The proposed rule added new § 125.3(c)(3), providing that a prime contractor must represent that it will make a good faith effort to utilize the small business subcontractors used in preparing its bid or proposal during contract performance. SBA proposed that a prime contractor is deemed to have “used” a small business subcontractor in preparing its bid or proposal when: (i) the offeror specifically references a small business concern in a bid or proposal, (ii) the offeror has entered into a written agreement with the small business concern for purposes of performing the specific contract as a subcontractor, or (iii) the small business concern drafted portions of the proposal or

submitted pricing or technical information that appears in the bid or proposal, with the intent or understanding that the small business concern will perform that related work if the offeror is awarded a contract. Some commenters opposed the provision in general terms, but as discussed previously, this provision is statutory and must be implemented. Some commenters requested clarifying whether this definition will be implemented in the FAR. SBA notes that this provision will be implemented in the FAR.

One commenter argued that “in the same amount and quality used in preparing and submitting the bid or proposal” is not feasible because quantities often change. SBA disagrees. This language is directly in the statute and is meant to address a specific problem. If the subcontractor was “used” in preparing the offer as defined in the regulation, then the prime contractor must provide the contracting officer with a written explanation as to why the subcontractor was not actually used in performance to the extent set forth in the offer. That explanation would certainly include any information relating to required quantities changing, so that the small business could not be used in performance to the same extent as that set forth in the offer.

One commenter noted that the proposed language would not address cases where a prime contractor issues a nominal subcontract but with significant down-scoping of the original proposed work share, which according to the commenter is common practice. In response to this comment, SBA has amended § 125.3(c)(3) by adding the term “scope.”

One commenter argued that commitments to suppliers are never made at time of proposal because an order may never be awarded, the supplier may go out of business, the supplier may be removed due to quality or delivery or other issues, or the supplier’s quote may have expired before an award is received. The commenter argued that due to

FAR competition requirements, many proposals are received and responded to which do not become actual orders. The commenter recommended that the government allow large businesses to place orders with small business concerns and reimburse them. As SBA stated in the proposed rule, responding to a request for a quote does not constitute use in preparing the bid or offer. SBA has added this language to § 125.3(c)(3). Further, the statute and regulation require the prime contractor to notify the contracting officer with an explanation, which could include all of those reasons (e.g., subcontractor out of business, quality or delivery issues, etc.).

Some commenters recommended requiring a more formal bid listing process requiring prime contractors to list in their bid the subcontractors they would use, allowing for later substitution if necessary. SBA considered requiring prime contractors to name subcontractors, but SBA has heard from the public and industry that selection of subcontractors in some industries does not occur until after contract award and requiring the prime to name subcontractors could result in a reduction of subcontracting opportunities.

Some commenters recommended requiring prime contractors to submit formal requests to amend subcontracting plans, arguing that this would assist in ensuring that prime contractors used the subcontractors named in their proposals. SBA disagrees. Subcontracting plans generally do not name specific small business concerns. Subcontracting plans simply establish goals for each socioeconomic category.

Some commenters recommended requiring prime contractors to include with their proposals fully executed subcontracts that are conditioned on the prime contractor's receipt of contract award and that are effective throughout the entire life of the contract.

Other commenters recommended requiring a contract as evidence that a contractor failed to comply with proposed § 125.3(c)(3). SBA disagrees. In some industries, specific subcontracts are not solicited or awarded until well after contract award. Thus, it is not possible to impose a requirement that prime contractors include subcontracts in their proposals government-wide. At the same time, limiting the rule's applicability to situations where a formal subcontract has been executed would severely hamper the scope and breadth of the statutory provision. Further, it could have the effect of reducing prime contractors' willingness to enter into subcontracts prior to offer, which is clearly contrary to congressional intent.

One commenter argued that proposed § 125.3(c)(3) should not be triggered if a prime contractor awards the work to another small business and is otherwise not in violation of any contract by doing so. The commenter argued that the goal of the Jobs Act is to protect small business in general, not specific small businesses. SBA disagrees, and believes that the Jobs Act specifically intended to apply to and protect individual small businesses. This statutory provision does not reference whether or not the prime contractor is meeting its goals. The statute was intended to address the complaints of small businesses that expended significant time and resources to assist large businesses prepare bids, quotes and proposals that assisted those large businesses in being awarded a contract and then were not used in the performance of that contract.

One commenter suggested that the rule not apply if a quote from a small business is included in the bid or proposal as supporting documentation for a budget item. SBA disagrees. This is the type of behavior that the statute is intended to address. A prime

contractor's inclusion of a quote in a bid raises the expectation of the subcontractor that its quote was used to win the award.

SBA received a number of comments recommending revisions to the language of proposed § 125.3(c)(3)(i)-(iii), which defined when an offeror used a small business in preparing a bid or proposal.

One commenter recommended revising § 125.3(c)(3)(i) to provide that an offeror used a small business concern in preparing the bid or proposal if “the offeror indicates it has awarded or selected the small business concern as a subcontractor to perform a portion of the specific contract.” SBA disagrees. If the prime refers to the subcontractor in its proposal or bid in order to influence the award, that is precisely the conduct this statutory provision was intended to address, without limiting it to a further representation that a subcontract has been awarded. If the prime feels it is necessary to mention the subcontractor by name, the prime contractor must explain why that firm is not used in performance.

One commenter requested clarification of whether “bid or proposal” in § 125.3(c)(3)(i) includes small businesses listed in a subcontracting plan submitted with the bid or proposal. SBA has added language stating that “referenced in the bid or proposal” includes associated small business subcontracting plans, if applicable. SBA notes that subcontracting plans are not necessarily required at the time of bid or proposal and are often not required until the apparent successful offeror has been identified.

One commenter argued that proposed § 125.3(c)(3)(i) and (c)(3)(iii) are unduly broad, suggesting that it is the subcontractor's perception of future work, rather than a reasonable expectation on behalf of both parties, that triggers the rule's requirements.

SBA disagrees and believes that the language of the proposed rule adequately captures the intent of the statute.

One commenter recommended defining the terms “agreement in principle” and “intent or understanding” in proposed § 125.3(c)(3)(ii). These terms will have to be interpreted by contracting officers and prime contractors on a case-by-case basis, as the provision is applied to specific factual circumstances.

One commenter recommended revising proposed § 125.3(c)(3)(ii) to read: “has a written agreement as to all material terms (including price, work scope, schedule, etc.) with the small business to perform as a subcontractor.” As discussed in the proposed rule, the statute applies where the subcontractor was “used” in preparing the bid or proposal. Requiring the level of detail recommended by the commenter is not consistent with statutory intent.

One commenter recommended revising proposed § 125.3(c)(3)(ii) by replacing “agreement in principle” with “has made a written commitment to.” SBA believes that “agreement in principle” is more consistent with statutory intent. Requiring written commitments might actually have the unintended effect of driving prime contractors to not enter into written agreements with subcontractors. Whether an agreement in principle existed will be a fact-specific exercise for the contracting officer to decide when evaluating prime contractor performance.

Some commenters recommended revising proposed § 125.3(c)(3)(iii) by replacing “intent or understanding” with a written communication standard. Commenters suggested that correspondence would be sufficient, and a signed contract would not be

necessary. SBA concurs with this comment and has amended the regulation to clarify that evidence should be in writing.

The proposed rule added § 125.3(c)(4), which implemented Section 1322 of the Jobs Act. This provision established a requirement that a prime contractor on a covered contract must notify the contracting officer in writing if the prime contractor fails to utilize a small business concern used in preparing and submitting the prime contractor's bid or proposal.

SBA received eleven comments expressing concern that proposed § 125.3(c)(4) does not go far enough. Some commenters argued that prime contractors will not freely come forth and self-report. First, SBA notes that this notice requirement is statutory. In addition, SBA notes that the rule states that subcontractors can inform contracting officers of violations of this requirement.

Based on a comment, SBA has amended proposed § 125.3(c)(4) to state that the "prime contractor" rather than the "offeror" must provide the contracting officer with a written explanation as to why the prime did not acquire articles, equipment, supplies, services, or materials, or obtain the performance of construction work from the small business concerns that it used in preparing the bid or proposal, in the same scope, amount, and quality used in preparing and submitting the bid or proposal.

In addition, SBA has amended proposed § 125.3(c)(4) to clarify that the prime contractor must submit the written notification to the contracting officer prior to submitting to the Government the invoice for final payment and contract close-out.

One commenter suggested requiring prime contractors to inform subcontractors that subcontractors have the right to appeal to the contracting officer when the proposed

small business is not used. SBA notes that the terms of the contract will determine the extent to which the contracting officer has control over who the prime contractor uses as a subcontractor. This statutory provision is intended only to include the prime contractor's utilization of subcontractors used in preparing the bid as part of the performance evaluation of the prime contractor.

One commenter recommended mirroring the requirement of DFAR 252.219-7003(g), arguing that lack of consistency between the rules will cause confusion. DFAR 252.219-7003(g) reads as follows: "In those subcontracting plans which specifically identify small businesses, the Contractor shall notify the Administrative Contracting Officer of any substitutions of firms that are not small business firms, for the small business firms specifically identified in the subcontracting plan. Notifications shall be in writing and shall occur within a reasonable period of time after award of the subcontract. Contractor-specified formats shall be acceptable." DFAR 252.219-7003(g) applies only when the prime contractor identifies specific small business concerns in the subcontracting plan, and no DFAR provision requires prime contractors to identify specific subcontractors in subcontracting plans. SBA believes that the language of the proposed rule more truly captures the statutory intent of this requirement. In any event, SBA's final rule will be implemented in the FAR and DFAR, and changes to those regulations will be made as necessary to ensure consistency.

One commenter asked whether the rule will apply retroactively. The general rule is that regulations apply to solicitations issued on or after the effective date of the regulation. However, this rule will have to be implemented in the FAR, and consideration will be given as to whether any of these provisions need to apply to existing contracts.

One commenter recommended requiring the prime contractor to report its intention not to use a designated subcontractor before the fact, rather than after the fact. Reporting is required if a subcontractor is not used in performance, and when that is triggered will depend on the specific facts and circumstances. The purpose of the reporting is primarily for purposes of evaluating the prime contractor's overall performance, and not necessarily for the purpose of affecting actual performance under the contract.

One commenter recommended prohibiting prime contractors from terminating subcontractors and then performing the work on their own. The commenter suggested requiring that small business subcontracts may only be terminated for cause, and the prime contractor must make a good faith effort to replace the subcontractor with another small business subcontractor, all of which is subject to the contracting officer's approval. In addition, the commenter suggested that if a small business subcontractor is acquired by a large firm, the prime contractor must replace the subcontractor with a new small business subcontractor within six months. These comments go well beyond statutory intent. The statute did not intend for the contracting officer to intercede in the private contractual relationships of commercial concerns.

One commenter recommended that the requirement should apply to all contracts. By statute, this requirement applies to all contracts requiring subcontracting plans. SBA believes that this was clear in the rule as proposed, and, as such, no further change is needed.

Some commenters opposed the requirement, arguing that suppliers are sometimes unable to fulfill requirements. SBA notes that this can be explained in the notice to the contracting officer.

Some commenters requested that SBA establish a threshold at which this reporting requirement would be triggered. Commenters also requested that SBA establish a timeframe for reporting. The statute does not create a threshold or a timeframe. SBA maintains that it will be incumbent upon the prime contractor to understand its subcontractors and proactively notify the contracting officer when the prime contractor has reason to believe that the relationship with the subcontractor met the definition. As for timeframe, it is difficult to set a timeframe because until the contract is completed, there is always theoretically a possibility that the prime contractor will use the subcontractor to the extent initially anticipated. Thus, it will be up to the prime contractor to come forward and notify the contracting officer when the prime contractor knows that the use of the subcontractor met the definition and that it will not use the subcontractor in performance in the same scope, amount, and quality as used in preparing and submitting the bid or proposal. However, SBA has added a requirement that the notice take place prior to submission of the final invoice for contract closeout.

Some commenters argued that the notification requirement will be a disincentive for prime contractors from specifically including small business concerns in their proposals, which limits small businesses' ability to participate in the development of proposals and gain valuable insight into how prime contractors approach proposals in general. SBA understands this concern, but the requirement is statutory. Obviously,

small business subcontractors felt that statutory action was needed to address some prime contractor mistreatment of some small business subcontractors.

Some commenters requested an exemption from the requirements in § 125.3(c)(4) and (c)(5) for non-profit research institutions, arguing that reporting and oversight were an onerous burden for these groups. In the alternative, one commenter recommended requiring such organizations to provide notice and justification only in annual reports. SBA does not adopt this comment. Nonprofits are not exempt under the statute and are not exempt from these reporting requirements.

Some commenters argued that contract awards attained via “bait & switch” should be vacated. SBA disagrees. In SBA’s view, the intent was to use this information for purposes of evaluating performance. The statutory intent was not to require terminations whenever this provision was violated. Contracting officers have the discretion to consider such information for purposes of considering continued performance or exercising options, but SBA does not believe that mandating such action in all cases would be practical.

Late or Reduced Payment

The proposed rule added § 125.3(c)(5), which implemented Section 1334 of the Jobs Act. This provision established a requirement that a prime contractor notify the contracting officer in writing whenever a payment to a subcontractor is reduced or is 90 days or more past due for goods and services provided for the contract and for which the Federal agency has paid the contractor. SBA proposed that the prime contractor shall include the reason for the reduction in payment or failure to pay a subcontractor in the written notice.

SBA received over twenty comments on proposed § 125.3(c)(5). The commenters were split between those who suggested there be concrete consequences for prime contractors giving reduced or delayed payments, and those who argued that “unjustified” is not clearly defined, leaving prime contractors in a position to have to report in situations where the subcontractor is actually at fault.

In response to several comments, SBA has amended the language of § 125.3(c)(5) to clarify that this requirement applies only to small business subcontractors. The statutory provision pertains to contracts where a small business subcontracting plan is required, and such plans do not contain a goal for large business subcontractors.

Some commenters argued that the requirement should not apply when a prime contractor has attached only a quote for the purchase of goods or services in a bid, arguing that a quote is only a projection of cost and may change due to market conditions. In response to these comments, SBA has amended § 125.3(c)(5) to state that the reduced price applies only if the prime contractor awarded a subcontract.

One commenter suggested implementing a requirement similar to the requirement for agencies that are delinquent in reimbursing contractors. SBA notes that this information will be used for past performance evaluation purposes. A different statute governs payment to prime contractors.

One commenter recommended that the requirement should be extended to lower tier subcontractors that do not pay their subcontractors. SBA does not concur. The statute specifically refers to prime contractors and the contracting officer’s ability to consider late payment in measuring prime contractor performance. There is lack of

privity and authority between the government and lower tier subcontractors to extend the requirement as suggested.

Some commenters recommended that each invoice submitted by the prime contractor include a report of payments to be made to each subcontractor, listing the name of the subcontractor and the amount owed. SBA does not adopt this comment. This is not required by statute and would increase the recordkeeping and reporting requirements of prime contractors.

Some commenters opposed proposed § 125.3(c)(5) as too far-reaching. Some commenters argued that the requirement should apply only to late payments, not reduced payments. Other commenters recommended implementing the requirement on a contract-by-contract basis, based on the contracting officer's review of past performance. SBA does not concur. The statute specifically includes reduced payments and applies to all covered contracts.

Some commenters argued that federal construction contractors are already subject to more stringent requirements under the FAR, including sanctions under Title 18 of the United States Code for making false claims. SBA notes that the requirements that apply in the construction arena do not apply government-wide, while these provisions apply to all contracts. However, the more stringent construction requirements still apply.

Some commenters requested clarification of the definition of "unjustified" late or reduced payment. Some commenters suggested that the definition should not include situations where the prime contractor acted in good faith and pointed out that budget cuts, agency reorganization, and similar situations are common reasons for reduced payment. Some commenters argued that a prime contractor often has legitimate reasons

(substandard performance, improper billing, performance of unauthorized work, etc.) for late or lower payment. One commenter recommended that SBA clarify that the reporting obligation should not apply if the late/reduced payment was the byproduct of a government change to requirements. One commenter recommended allowing prime contractors to appeal a determination that a reduction is “unjustified.” SBA believes that the facts of a specific case should determine whether a late or reduced payment was justified or not. A prime contractor must communicate the reasons for making a late or reduced payment to the relevant contracting officer as part of its required notification. A contracting officer will then use his or her best judgment in determining whether the late or reduced payment was justified.

One commenter recommended clarifying what constitutes a “payment” to the prime contractor under different contract types. SBA notes that the opportunity for defining these terms will occur when these provisions are implemented in the FAR.

Some commenters suggested that reports be protected if they contain proprietary and/or classified information. One commenter recommended adding a provision that would exclude prime contractors from having to include in a report on the reasons for reduced or delayed payment where such information: (1) is exempt from FOIA disclosure; (2) constitutes “contractor bid or proposal information” under the Procurement Integrity Act; or (3) is protected under the Privacy Act or other relevant law. SBA maintains that the reasons should be provided to the contracting officer—as required by statute—and the relevant information disclosure laws would apply to the reports. It is not up to prime contractors to interpret and apply information disclosure laws.

Some commenters requested clarification of “reduced price.” In response to these comments, SBA has amended § 125.3(c)(5) to clarify that “reduced price” means the price is less than the amount initially agreed to in a written, binding contractual document.

Several commenters requested clarification of the term “upon completion of the responsibilities.” Specifically, one commenter asked whether the rule applies to payment reductions on progress payments. Another commenter asked whether the obligation of a contractor to report a reduced payment to a subcontractor applies to every payment made by the prime contractor or applies only at the completion of the entire subcontract. In response to these comments, SBA has amended § 125.3(c)(5) to state that the completion of responsibilities means that the subcontractor is entitled to payment under the terms of the subcontract.

Some commenters made recommendations for uniform payment terms for subcontracts. Such recommendations go beyond statutory intent and are beyond the scope of this rule.

One commenter recommended holding a public meeting where industry representatives from both large and small business may voice concerns. SBA held meetings in several cities to receive input on the proposed rule as part of its Jobs Act tour, and received significant written comments on the proposed rule. As such, SBA believes that additional public forums are unnecessary to fully understand the public concerns regarding the implementation of this rule. In addition, the public will have another opportunity to comment when this rule is incorporated in the FAR.

One commenter requested that SBA reduce the late payment definition from 90 days to 30 days. SBA does not adopt this comment. For purposes of this statutory reporting requirement, the statute defines late as being 90 days past due. This final rule continues to adopt the statutory definition.

One commenter recommended requiring agencies to publish actual payments to small business subcontractors. SBA does not adopt this comment. This requirement would be overly burdensome, and prime contractors as well as subcontractors may not want such information to be public. There is no clear public benefit from publicizing such information.

In response to comments, SBA has added new § 125.3(c)(6) to this final rule, which provides that if at the conclusion of a contract, the prime contractor did not meet all of the small business subcontracting goals in the subcontracting plan, the prime contractor shall provide the contracting officer with a written explanation as to why it did not meet the goals of the plan so that the contracting officer can evaluate whether the prime contractor acted in good faith as set forth in § 125.3(d)(3).

One commenter opposed proposed § 125.3(d)(5), arguing that payments to subcontractors may vary month to month under normal circumstances. The commenter also argued that subcontractors have existing legal means to receive payments due. Again, SBA notes that the requirement of proposed § 125.3(d)(5) is required by statute. In some circumstances, subcontractors do not have the resources to litigate claims, or may not want to exercise rights out of fear of not receiving future work.

One commenter recommended clarification of the differing language in proposed § 125.3(c)(5) (“more than 90 days past due”) and proposed § 125.3(d)(5) (“more than 90

days late”). The commenter recommended changing both to “more than 90 days past the contractual due date.” SBA has changed the language in both provisions to “90 days past due under the terms of the subcontract.”

Contracting Officer Responsibilities

The proposed rule revised § 125.3(d) to clarify that the contracting officer is responsible for monitoring and evaluating the prime contractor’s small business subcontracting plan compliance and reporting.

SBA received a number of comments expressing concern that over-extended contracting officers will not actually be able to monitor a prime contractor’s compliance with the subcontracting plan on an ongoing basis as described in proposed § 125.3(d). SBA disagrees. Contracting officers are already required to monitor and evaluate prime contractors’ compliance with subcontracting plans. The intent of this rule is simply to more clearly define the contracting officers’ responsibilities.

Some commenters recommended Office of Small and Disadvantaged Business Utilization (OSDBU) participation in subcontracting plan compliance and enforcement. SBA disagrees. A subcontracting plan is a material part of a contract, and only the contracting officer has the authority to monitor contract performance. OSDBUs are not in the acquisition chain of command and have no authority to order a contracting officer to accept or reject a subcontracting plan or take some other enforcement action. Certainly, individual contracting officers may decide that OSDBUs can assist with subcontracting plan monitoring and enforcement, but SBA cannot impose a rule government-wide that gives OSDBUs authority over contracts.

Some commenters recommended requiring that the contracting officers in the field be responsible for monitoring compliance with subcontracting plans. SBA does not adopt this comment. The rule states the contracting officer is responsible, and if there is more than one contracting officer involved in a particular contract, the contracting agency must determine which contracting officer is responsible.

One commenter recommended the use of federal audit agencies to ensure that prime contractors comply with subcontracting requirements. Agencies may use audit agencies to assist in compliance, but SBA cannot mandate such a requirement in all cases. Audit agencies face resource challenges as well. SBA and the Defense Contract Management Agency (DCMA) do conduct subcontracting compliance reviews each year.

One commenter recommended requiring subcontracting program review once every two years if a prime contractor has active contracts with subcontracting plans. SBA does not adopt this comment. The contracting officer is responsible for reviewing, monitoring and evaluating a prime contractor's subcontracting plan performance with regard to each contract. In addition, compliance reviews conducted by SBA and DCMA occur as dictated by resource availability.

The proposed rule added new § 125.3(d)(1), which requires contracting officers to ensure that contractors submit their subcontracting reports into eSRS within 30 days after the report ending date. Some commenters recommended transparent monitoring to improve accountability of prime contractors. SBA notes that the eSRS system is a reporting system that enables a prime contractor to report to the contracting officer. Public access is beyond the scope of this rule, and access to the system is not controlled by SBA.

The proposed rule added § 125.3(d)(2), which requires the contracting officer to review every prime contractor's report within 60 days of the report ending date and accept or reject the report. One commenter recommended requiring contracting officers to give a reason for rejecting a report in order to ensure clarity and quick responses. SBA concurs and has amended proposed § 125.3(d)(2) to provide that the contracting officer should give an explanation for rejecting a report, since the eSRS system is already capable of doing this.

One commenter suggested that the language regarding conducting an SSR review should include "or designated Agency representative," arguing that most agencies have an OSBP associate director review and accept SSRs. SBA recognizes that agencies usually have a person other than a contracting officer review the summary reports, since a summary report frequently contains achievements on multiple contracts with multiple contracting officers. However, the purpose of this rule is to clarify the responsibilities of the contracting officer.

One commenter recommended including language regarding the timeframe for a contracting officer to review all resubmitted reports. SBA notes that the same timeframes apply that apply to the submission of the original report.

The proposed rule amended redesignated § 125.3(d)(3) (former § 125.3(d)) to clarify that a contracting officer must evaluate whether a prime contractor made a good faith effort to comply with its small business subcontracting plan. The proposed rule maintained the current definition of when a prime contractor has made a good faith effort to comply with its small business subcontracting plan (redesignated § 125.3(d)(3)(i)-(iii), former § 125.3(d)(1)-(3)).

One commenter suggested that prime contractors that have not met subcontracting plan goals should be prohibited from receiving an option award until the prime contractor can show compliance. SBA disagrees. This could result in the government being deprived of vital goods or services and would severely hamper mission effectiveness.

Several commenters requested clarification of the actions contracting officers could take in response to a contractor's failure to meet its subcontracting goals. One commenter recommended that the government instruct contracting officers that compliance with a subcontract plan constitutes a material element of contract performance, with instruction to issue show cause notices and default terminations to prime contractors who fail to comply with subcontracting plans. SBA notes that the statute and the FAR provide that a subcontracting plan is a material part of a contract and provide for the possibility of liquidated damages, as well as the other actions noted by the commenter. However, these actions cannot be required by rule in all cases.

The proposed rule added new § 125.3(d)(4), which provides that the contracting officer must evaluate the prime contractor's written explanation concerning its failure to use a small business concern in the performance of a contract when that small business concern was used to prepare the bid or proposal.

One commenter recommended requiring the contracting officer to document a justification for awarding to a prime contractor with a history of not meeting subcontracting plan goals. SBA notes that contracting officers are required to consider subcontracting plan past performance in negotiated acquisitions. Further, SBA's regulations permit contracting officers to use other subcontracting-related evaluation factors.

SBA received significant negative comment on proposed § 125.3(d)(6), which provided that the contracting officer must consider whether to require a prime contractor to enter into a funds control agreement with a neutral third party if the prime contractor fails to pay subcontractors in a timely manner or fails to pay the agreed upon contractual price without justification. Although requested, SBA did not receive any comments explaining how this process should work or has worked in practice. Consequently, SBA has decided not to implement this provision in this final rule.

Proposed § 125.3(d)(7) required the contracting officer to record the identity of a prime contractor with a history of unjustified untimely payments to subcontractors in the Federal Awardee Performance and Integrity Information System (FAPIIS) or any successor system. This requirement is statutorily mandated. SBA received several comments supporting proposed § 125.3(d)(7) (changed to § 125.3(d)(6) in this final rule) but requesting that it go further in punishing non-compliant prime contractors. One commenter recommended a repository of names of prime contractors who have treated subcontractors poorly. SBA notes that the statutory requirement is FAPIIS.

One commenter asked whether these rules would override or interfere with already existing regulations concerning payment of subcontractors in the construction industry. These rules are in addition to, and do not supersede, other laws and regulations that apply to construction contracts, such as the requirement that the prime contractor certify in an invoice that all subcontractors have been paid or will be paid after payment. The commenter also asked whether information entered into FAPIIS concerning a prime contractor that has a history of unjustified late or reduced payment of subcontractors would be available to the public. That question is beyond the scope of this rule and

SBA's knowledge. The commenter should inquire with GSA, the government agency responsible for FAPIIS.

The proposed rule added § 125.3(d)(8), providing that the contracting officer must require prime contractors to update their subcontracting plans whenever an option is exercised, as currently required by FAR 19.705-2(e). SBA received five comments expressing concerns that the additional reporting requirements at the time of option exercise would be burdensome.

One commenter argued that this requirement would be an administrative redundancy. The commenter argued that some agencies already call out for small business subcontracting plans to have subcontracting goals for individual option years. The commenter argued that there may be a lack of foreseeability when a contractor submits a proposal that a subcontracting plan may be required. The commenter argued that if a prime contractor is awarded an option continuing existing services, the prime contractor will already have subcontractors in place (mobilized and executing the work), which may not be small business concerns. The commenter argued that replacing the existing subcontractors would result in additional costs and operational inefficiency. SBA disagrees. The existing requirement in the FAR, which we are simply adding to SBA's regulations, requires the plan to be updated as necessary. All of the factors that the commenter articulates can be considered when deciding whether to change any of the percentages for an option period.

One commenter argued that if existing work is won through a recompetes, then the new contract should have precedence over the old contract terms, subcontracting plan, personnel staffing, and other contract-related issues. SBA notes that new contracts

should have new subcontracting plans, based on the subcontracting opportunities for the new contract.

One commenter argued that pursuant to FAR 19.704(c), a subcontracting plan is supposed to contain separate goals for the base contract and each option individually. The commenter argued that any updated subcontracting goals can be by a confirming correspondence and subsequent reporting. In the final rule, SBA has amended this provision (now contained in § 125.3(d)(7)) to state that the contracting officer has the discretion to require an updated subcontracting plan.

One commenter recommended that updates for options and modifications be considered as a new subcontracting requirement from the date of the modification or the date the option is invoked, requiring a subcontracting plan only for the new portion of the work and only if that new work, standing alone, exceeds the applicable threshold. The commenter argued that this approach is consistent with FAR 19.702(a)(1). SBA has added a new § 125.3(d)(10) to clarify that the rule will apply to the subcontracting opportunities from that point forward and will not have retroactive effect. The ISR and SF-294 require that achievements be cumulative from the inception of the contract, and the accompanying instructions require that goals be rolled into the report as options are exercised. For example, if the base contract contained a small business goal of \$10 million and each option contained a small business goal of \$2 million, the small business goal for the entire contract in option year one would be \$12 million. This ensures that the contracting officer is doing an “apples-to-apples” comparison when he compares achievements against goals.

SBA received six comments on proposed § 125.3(d)(9) (now § 125.3(d)(8)), under which the contracting officer must require a subcontracting plan if a modification causes the overall value of a contract to exceed the subcontracting plan threshold. As currently written, the FAR only requires a subcontracting plan if the value of the modification exceeds the subcontracting threshold. Commenters expressed concern about having to add a subcontracting plan if a modification to the contract raises the value above the subcontract threshold since this eventuality might occur when a substantial portion of the work has already been completed, and commitments have already been made on an ongoing basis. In response, SBA notes that plans are only required to the extent that subcontracting opportunities exist.

SBA received several comments on proposed § 125.3(d)(10) (now § 125.3(d)(9)), which allows a contracting officer to require a subcontracting plan if a prime contractor's size status changes from small to other than small as a result of a size recertification. Some commenters recommended requiring the contracting officer to require a subcontracting plan rather than making it discretionary. SBA disagrees. This is not required by statute. Further, it may be impractical to require a subcontracting plan at or near the end of performance, or after all subcontracting opportunities have passed. Thus, SBA maintains that it should be left to the discretion of the contracting officer.

Compliance Reviews

SBA received several comments addressing § 125.3(f) in general. One commenter recommended more third-party monitoring of prime contractors, with verification by affected subcontractors. SBA does not concur. Compliance with these provisions will be evaluated as part of the compliance reviews conducted by SBA,

DCMA, Office of Naval Research, DLA Energy, and possibly other government agencies in the future; there are no other resources available. Another commenter recommended that contracting officers be required to respond to compliance review audits. SBA notes that a copy is sent to the contracting officer. Another commenter recommended that SBA perform more compliance reviews. SBA conducts as many as possible consistent with its resources and other priorities. One commenter argued that the compliance review requirements are potentially burdensome for prime contractors and difficult to obtain from other than small subcontractors. SBA disagrees. These requirements already exist. Without monitoring or spot checking, there is no incentive to properly administer subcontracting plans or to ensure that prime contractors are meeting their goals.

SBA received one comment on proposed § 125.3(f)(2)(i), which provided that a compliance review must include an analysis as to whether the prime contractor has assigned the correct NAICS code and corresponding size standard to the subcontract, and whether the subcontractor qualifies under the size or socioeconomic status claimed. The commenter recommended further clarification of proposed § 125.3(f)(2)(i). SBA notes that every subcontract must be assigned a NAICS code and size standard; otherwise there is no basis for a claim that a subcontract went to a small business. Thus, a compliance review must verify that that prime contractors or subcontractors are not improperly claiming to be small and using inappropriate NAICS codes and size standards.

SBA received several comments on proposed § 125.3(f)(2)(iii), which provided that a compliance review must include an analysis of whether the prime contractor is monitoring its other than small subcontractors with respect to their subcontracting plans,

determining achievement of their subcontracting goals, and reviewing their ISRs or other reports.

Some commenters requested additional guidelines for monitoring. SBA notes that the prime contractor is responsible for making sure that the subcontracting plan requirements flow down to subcontractors and for monitoring subcontractor performance. Some commenters recommended clarifying the definition of the term “monitor.” One commenter argued that prime contractors do not have the same abilities to do so with respect to subcontractors as the government does with respect to prime contractors. Whether or not prime contractors have the same ability to monitor performance of subcontractors as the government does for primes, the government has no ability to monitor a prime contractor’s subcontractors. As such, this function must be the responsibility of prime contractors. SBA notes that this includes monitoring whether the relevant clauses are being included in subcontracts and whether goals are being met.

One commenter that opposed proposed § 125.3(f)(2)(iii) argued that prime contractors never before had to monitor other than small subcontractors’ subcontracting plan compliance. This is incorrect. The FAR currently requires prime contractors to ensure that subcontractors issue subcontracting plans and issue reports.

Subcontracting Consideration in Source Selection

The proposed rule added new § 125.3(g)(1), under which SBA proposed to give agencies the discretion to consider subcontracting in source selection.

One commenter recommended that the FAR be amended to include subcontracting consideration in source selection. SBA notes that the rule will be implemented in the FAR after SBA’s regulations are finalized.

SBA received six comments on proposed § 125.3(g)(1) requesting the inclusion of past prime contractor performance as an evaluation factor in source selection. SBA has agreed to amend its rule to make it clear that in addition to considering subcontracting plan compliance under a past performance factor, a contracting officer can also create an evaluation factor or subfactor specifically for purposes of considering subcontracting plan past performance.

One commenter recommended clarification of the circumstances under which the evaluation factor would apply. SBA notes that it applies only in full and open competition with value above the threshold, and it will apply at the discretion of the contracting officer.

One commenter recommended that government contractor past performance databases should be required to quantify successful compliance with subcontracting plans. The commenter argued that this will assist source selection boards in determining the credibility of a concern's proposed subcontracting plan and past performance on a per-contract basis. SBA notes that like other aspects of the solicitation, the contracting officer will establish the parameters of the evaluation factor and what information should be submitted.

One commenter argued that this particular provision in the proposed rule will largely benefit small businesses that pursue contracts as Federal prime contractors and does not benefit (and in fact may have a detrimental impact on) small businesses that pursue work as Federal subcontractors. The commenter recommended an equivalent evaluation to assure that the awarded prime contractor—large or small—is providing maximum practicable opportunity to small business concerns at all levels of

subcontracting. SBA disagrees. It is unclear how this proposal will harm small businesses. This proposal establishes an evaluation factor for small business subcontracting and ensures that a small business competing for a larger contract in full and open competition is not at a disadvantage, since small businesses are not required to have small business subcontracting plans. Small businesses will benefit either way—at the prime level or at the subcontracting level, depending on who wins the competition.

In response to several comments, SBA has redesignated proposed § 125.3(g)(2) (former § 125.3(g)) as § 125.3(g)(3) in this final rule and added a new paragraph (g)(2), providing that a contracting officer may include an evaluation factor in a solicitation which evaluates an other than small business concern's commitment to pay small business subcontractors within a specific number of days after receipt of payment from the Government.

Multi-agency, Federal Supply Schedule, Multiple Award Schedule and Governmentwide acquisition IDIQ contracts

The proposed rule added new § 125.3(h), which addresses subcontracting plans in connection with multiple award Multi-agency, Federal Supply Schedule, Multiple Award Schedule and Governmentwide acquisition indefinite delivery, indefinite quantity (IDIQ) contracts. Under proposed § 125.3(h)(1), SBA proposed that the contractor will report small business subcontracting achievement for individual orders to the contracting officer for the ordering or funding agency on an annual basis. SBA requested comments on whether the reporting requirement should apply to all orders or only apply to orders above a certain threshold.

SBA received eleven comments on proposed § 125.3(h)(1) expressing concerns that the additional reporting requirements for individual orders would be overly burdensome. Several commenters suggested creating a threshold level that would trigger the order-by-order reporting requirement. Some commenters recommended requiring reporting at the contract level or individual order level, but not both. Some commenters argued that the requirement should apply only to individual orders that are above a certain threshold. One commenter argued that on IDIQ contracts, a contractor may not know how many or which subcontractors are needed until the government issues task orders. Some commenters expressed concern about the additional burden imposed on large businesses or additional costs that might result from the requirement to report task-order subcontracting. Some commenters argued that contracting officers are already overburdened and that they should be spending time reviewing contracts rather than reports. One commenter who opposed the added reporting requirement argued that it is not required by statute. One commenter who supported the requirement recommended that all orders be reported with no minimum threshold to ensure maximum transparency.

Based on the comments received, SBA has decided that as a matter of policy the funding agency of an order should receive credit towards its small business subcontracting goals for orders awarded under another agency's contract. This policy is consistent with SBA's long-standing policy with respect to prime contracts, where the funding agency receives the credit towards its prime contracting goals for orders awarded under another agency's contract. The policy promotes transparency and accountability for prime contractors, and is consistent with the Small Business Jobs Act provisions concerning compliance, oversight and review of subcontracting plans. The requirement

to report to the ordering agency on an annual basis will not be overly burdensome, as the new provision only applies where the funding agency and the contracting agency are not the same agency, and prime contractors already must report this information to the contracting agency. The contracting agency will still be responsible for the subcontracting plan for the underlying IDIQ contract. SBA recognizes that electronic reporting systems and the FAR will have to be revised before 125.3(i) can be implemented or utilized by ordering agencies or prime contractors. To ensure data integrity, SBA does make clear in this final rule that only one procuring agency may receive credit towards its subcontracting goals for a particular contracting action.

One commenter requested clarification regarding the applicability of proposed § 125.3(h)(1) to Blanket Purchase Agreements (BPAs) and Basic Ordering Agreements (BOAs). In the final rule, SBA has clarified that the contracting officer may establish subcontracting plans for BPAs and BOAs as well as orders. However, the annual reporting requirement for subcontracting credit purposes applies to orders issued under the BPA or BOA.

Compliance with Executive Orders 12866, 13563, 12988, 13132, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601-612)
Executive Order 12866

The Office of Management and Budget (OMB) has determined that this final rule is a significant regulatory action for purposes of Executive Order 12866. Accordingly, the next section contains SBA's Regulatory Impact Analysis. This is not a major rule, however, under the Congressional Review Act, 5 U.S.C. 801, et. seq.

Regulatory Impact Analysis:

1. Is there a need for the regulatory action? The regulations implement Sections 1321, 1322 and 1334 of the Small Business Jobs Act of 2010, Pub. L. No. 111-240, 124 Stat. 2504, September 27, 2010 (Jobs Act); 15 U.S.C. §§ 637(d)(6)(G), (d)(12). Section 1321 of the Jobs Act requires the Administrator to establish a policy on subcontracting compliance within one year of enactment.

2. What are the potential benefits and costs of this regulatory action?

The regulations will benefit small business subcontractors by encouraging large business prime contractors to pay small business subcontractors in a timely manner and the agreed upon contractual price. The regulations will benefit small business subcontractors by encouraging large business contractors to utilize small business concerns in contract performance where the prime contractor used the small business concern to prepare the bid or proposal. The regulations will benefit small business subcontractors by clarifying the responsibilities of the contracting officer in monitoring small business subcontracting plan compliance. The regulations will benefit small business subcontractors by specifically authorizing procuring agencies to consider proposed small business subcontracting when evaluating offers.

The regulations will benefit small business subcontractors by requiring large business concerns to report subcontracting results on an order-by-order basis, thereby enabling the funding agency to more closely monitor small business subcontracting in connection with the order and enabling the funding agency to receive credit towards its small business subcontracting goals. The regulation will benefit the contracting agency because the agency will not have to establish or monitor subcontracting plans for the contract. The rule benefits small business subcontractors by providing transparency with

respect to small subcontracting on an order-by-order basis, thereby allowing the funding agency to monitor performance and establish subcontracting goals for particular orders.

eSRS will have to be altered to allow large business prime contractors to report subcontracting results on an order-by-order basis. Other systems may have to be altered to allow funding agencies to receive credit towards their small business subcontracting goals.

Large businesses will have to report to the contracting officer in writing when they fail to utilize a small business concern in contract performance when the prime contractor utilized the small business concern in preparing the bid or proposal. Large businesses will have to report to the contracting officer in writing when they fail to pay a subcontractor within 90 days or when they pay a subcontractor a reduced price. The contracting officer will have to consider these written explanations when evaluating contract performance. FAPIIS will have to be modified to allow contracting officers to identify large business prime contractors with a history of unjustified untimely payments.

3. What are the alternatives to this final rule?

Many of the regulations set forth in this final rule are required to implement statutory provisions, and the Jobs Act requires promulgation of a policy on subcontracting compliance, a requirement that prime contractors notify the contracting officer when payment to a subcontractor is late, and a requirement that prime contractors notify the contracting officer when the prime contractor uses a subcontractor to prepare an offer but does not use the subcontractor in performance. The alternative to the regulation concerning orders would be to maintain the current environment, where subcontracting results are not reported on an order-by-order basis, and agencies funding

orders do not receive credit towards their small business subcontracting goals.

Executive Order 13563

As part of its ongoing efforts to engage stakeholders in the development of its regulations, SBA solicited comments and suggestions from procuring agencies on how to best implement the Jobs Act. SBA held public forums around the country to discuss implementation of the Jobs Act. Where feasible, SBA incorporated public input into the rule. The regulations concerning evaluation factors provide contracting officers with the discretion to utilize various methods to improve small business subcontracting, without requiring their use in all cases. The rule concerning orders will provide contracting agencies with transparency by providing data concerning small business subcontracting for particular orders. Overall, these regulations minimize the burden resulting from these statutory provisions. SBA amended its regulations to remove outmoded thresholds that have increased and remove references to paper based forms that have been replaced by electronic reporting through eSRS.

As part of its implementation of this executive order and consistent with its commitment to public participation in the rulemaking process, SBA held public meetings in 13 locations around the country to discuss implementation of the Jobs Act, and received public input from thousands of small business owners, contracting officials and large business representatives. Although most of these amendments are new, SBA expects that public participation will help to form the Agency's retrospective analysis of related contracting regulations that are not being amended at this time.

Executive Order 12988

For purposes of Executive Order 12988, SBA has drafted this final rule, to the

extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of that Order, to minimize litigation, eliminate ambiguity, and reduce burden. This rule has no preemptive or retroactive effect.

Executive Order 13132

This rule does not have federalism implications as defined in Executive Order 13132. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various layers of government, as specified in the order. As such, it does not warrant the preparation of a Federalism Assessment.

Paperwork Reduction Act, 44 U.S.C. Ch. 35

For the purpose of the Paperwork Reduction Act, SBA has determined that this rule would impose new government-wide reporting requirements on large prime contractors. The Jobs Act requires such contractors to notify in writing contracting officers at the applicable procuring agency whenever a prime contractor fails to utilize a small business subcontractor used in preparing and submitting a bid or proposal; when the prime contractor pays a subcontractor a reduced price without justification; or when payments to a subcontractor are 90 days or more past due. These requirements will also be incorporated in the FAR.

Regulatory Flexibility Act, 5 U.S.C. 601-612

SBA has determined that this final rule may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601-612. Therefore, SBA has prepared a Regulatory Flexibility Act (RFA) analysis addressing the regulatory provisions.

RFA

When preparing a Regulatory Flexibility Analysis, an agency shall address all of the following: a description of why the action by the agency is being considered; the objectives and legal basis of the rule; the estimated number of small entities to which the rule may apply; a description of the projected reporting, recordkeeping and other compliance requirements; identification of all Federal rules which may duplicate, overlap or conflict with the proposed rule; and a description of significant alternatives which minimize any significant economic impact on small entities. This RFA considers these points and the impact the proposed regulation concerning subcontracting may have on small entities.

(a) Need for, Objectives, and Legal Basis of the Rule

The majority of the regulatory amendments are required to implement Sections 1321, 1322 and 1334 of the Small Business Jobs Act of 2010, Pub. L. No. 111-240, 124 Stat. 2504, September 27, 2010 (Jobs Act); 15 U.S.C. §§ 637(d)(6)(G), (d)(12). The regulations that are not required by the Jobs Act are intended to help small business subcontractors by explicitly authorizing procuring agencies to consider proposed small business participation when evaluating offers from other than small business concerns. The regulations allow contracting officers to establish subcontracting plans and require other than small prime contractors to report data on small business subcontracting in connection with certain orders under existing contracts.

(b) Estimate of the Number of Small Entities to Which the Rule May Apply

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of entities that may be affected by the rules. The RFA defines

“small entity” to include “small businesses,” “small organizations,” and “small governmental jurisdictions.” SBA’s programs generally do not apply to “small organizations” or “small governmental jurisdictions” because they are non-profit or governmental entities and do not generally qualify as “business concerns” within the meaning of SBA’s regulations. SBA’s programs generally apply only to for-profit business concerns. However, to the extent this rule will impact small organizations or small governmental jurisdictions that receive prime contracts from the Federal government with values that exceed the threshold, the numbers would be minimal, and the major provisions would only apply if the entity fails to pay or utilize small business subcontractors.

The final rule will not directly negatively affect any small business concern, because it applies to other than small concerns and contracting officers. The final rule will indirectly benefit small business concerns by requiring other than small prime contractors to report to the contracting officer when the prime contractor has failed to utilize a small business subcontractor used in preparing the bid or proposal. The final rule will also indirectly benefit small business concerns, by requiring large business prime contractors to report to the contracting officer when the prime contractor has failed to pay a small business subcontractor in a timely manner or pays a subcontractor a reduced rate without justification.

There are approximately 348,000 concerns listed as small business concerns in the Dynamic Small Business Search (DSBS) database. We do not know how many of these concerns participate in small business subcontracting. Firms do not need to register in the DSBS database to participate in subcontracting. The DSBS database is primarily

used for prime contracting purposes. Thus, the number of firms participating in subcontracting may be greater than or lower than the number of firms registered in the DSBS database.

(c) Projected Reporting, Recordkeeping and Other Compliance Requirements

To the extent the rule imposes new information collection, recordkeeping or compliance requirements, these requirements are imposed on other than small business concerns, not on small business concerns.

(d) Federal rules which may duplicate, overlap or conflict with the proposed rule

SBA is not aware of any rules which duplicate, overlap or conflict with the final rule. The final rule primarily implements statutory provisions.

(e) Significant alternatives to the rule which could minimize impact on small entities

Section 1321 of the Jobs Act requires SBA to promulgate regulations implementing it. Section 1321 of the Jobs Act and its implementing regulations primarily apply to contracting officers. Sections 1322 and 1334 of the Jobs Act amend portions of the Small Business Act, which SBA is responsible for administering and implementing through its regulations. The regulations implementing Sections 1322 and 1334 of the Jobs Act primarily apply to other than small concerns. As discussed above, the rule indirectly benefits small business concerns, without requiring small business concerns to report, keep records or take other compliance actions.

List of Subjects

13 CFR Part 121

Government procurement, Government property, Grant programs—business, Individuals with disabilities, Loan programs—business, Small businesses.

13 CFR Part 125

Government Contracting Programs; Small Business Subcontracting Program.

For the reasons set forth above, SBA amends parts 121 and 125 of title 13 of the Code of Federal Regulations as follows:

PART 121—SMALL BUSINESS SIZE REGULATIONS

1. The authority citation for 13 CFR part 121 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 636(b), 662, and 694a(9).

2. Amend § 121.404(g)(3)(ii) by adding the following sentence at the end of the paragraph:

121.404 When does SBA determine the size status of a business concern?

* * * * *

(g) * * *

(3) * * *

(ii) * * * However, a contracting officer may require a subcontracting plan if a prime contractor's size status changes from small to other than small as a result of a size recertification.

* * * * *

3. Amend § 121.411 as follows:

a. Revise paragraph (a); and

b. Redesignate paragraphs (b) and (c) as paragraphs (c) and (d) and add new paragraph (b).

121.411 What are the size procedures for SBA's Section 8(d) Subcontracting Program?

(a) Prime contractors may rely on the information contained in the System for Award Management (SAM) (or any successor system or equivalent database maintained or sanctioned by SBA) as an accurate representation of a concern's size and ownership characteristics for purposes of maintaining a small business source list.

(b) Even if a concern is on a small business source list, it must still qualify and self-certify as a small business at the time it submits its offer as a section 8(d) subcontractor. Prime contractors may accept a subcontractor's electronic self-certifications as to size, if the subcontract contains a clause which provides that the subcontractor verifies by submission of the offer that the size or socioeconomic representations and certifications made in SAM (or any successor system) are current, accurate and complete as of the date of the offer for the subcontract. Prime contractors or subcontractors may not require the use of SAM (or any successor system) for purposes of representing size or socioeconomic status in connection with a subcontract.

* * * * *

PART 125 – GOVERNMENT CONTRACTING PROGRAMS

4. The authority citation for part 125 is revised to read as follows:

Authority: 15 U.S.C. 632(p), (q); 634(b)(6); 637; 644 and 657(f); Pub. L. No. 111-240, § 1321.

5. Amend § 125.3 as follows:

- a. Revise paragraph (a);
- c. Revise paragraphs (b)(1) and (b)(3)(ii);
- d. Revise paragraph (c)(1) introductory text;

- e. Revise paragraphs (c)(1)(iii)-(vi);
- f. Add new paragraphs (c)(1)(vii)-(ix);
- g. Redesignate paragraph (c)(3) as (c)(7) and add new paragraphs (c)(3), (c)(4), (c)(5) and (c)(6);
- h. Revise paragraph (d);
- i. Revise paragraph (e)(3);
- j. Revise paragraphs (f)(1) and (f)(2);
- k. Revise paragraph (g); and
- l. Add new paragraph (h).

§ 125.3 Subcontracting assistance.

(a) General. The purpose of the subcontracting assistance program is to provide the maximum practicable subcontracting opportunities for small business concerns, including small business concerns owned and controlled by veterans, small business concerns owned and controlled by service-disabled veterans, certified HUBZone small business concerns, certified small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women. The subcontracting assistance program implements section 8(d) of the Small Business Act, which includes the requirement that, unless otherwise exempt, other than small business concerns awarded contracts that offer subcontracting possibilities by the Federal Government in excess of \$650,000, or in excess of \$1,500,000 for construction of a public facility, must submit a subcontracting plan to the appropriate contracting agency. The Federal Acquisition Regulation sets forth the

requirements for subcontracting plans in 48 CFR 19.7, and the clause at 48 CFR 52.219-9.

(1) Subcontract under this section means any agreement (other than one involving an employer-employee relationship) entered into by a Government prime contractor or subcontractor calling for supplies and/or services required for performance of the contract or subcontract (including modifications).

(i) Subcontract award data reported by prime contractors and subcontractors shall be limited to awards made to their immediate next-tier subcontractors. Credit cannot be taken for awards made beyond the immediate next-tier, except as follows:

(A) The contractor or subcontractor has been designated to receive a small business or small disadvantaged business credit from an ANC or Indian Tribe; or

(B) Purchases from a corporation, company, or subdivision that is an affiliate of the prime contractor or subcontractor are not included in the subcontracting base. Subcontracts by first-tier affiliates shall be treated as subcontracts of the prime.

(ii) Only subcontracts involving performance in the United States or its outlying areas should be included, with the exception of subcontracts under a contract awarded by the U.S. Department of State or any other agency that has statutory or regulatory authority to require subcontracting plans for subcontracts performed outside the United States and its outlying areas and subcontracts for foreign military sales unless waived in accordance with agency regulations.

(iii) The following should not be included in the subcontracting base: internally generated costs such as salaries and wages; employee insurance; other employee benefits; payments for petty cash; depreciation; interest; income taxes; property taxes; lease

payments; bank fees; fines, claims, and dues; Original Equipment Manufacturer relationships during warranty periods (negotiated up front with product); utilities such as electricity, water, sewer, and other services purchased from a municipality or solely authorized by the municipality to provide those services in a particular geographical region; and philanthropic contributions. Utility companies may be eligible for additional exclusions unique to their industry, which may be approved by the contracting officer on a case-by-case basis. Exclusions from the subcontracting base include but are not limited to those listed above.

(2) Subcontracting goals required under paragraph (c) of this section must be established in terms of the total dollars subcontracted and as a percentage of total subcontract dollars. However, a contracting officer may establish additional goals as a percentage of total contract dollars.

(3) A prime contractor has a history of unjustified untimely or reduced payments to subcontractors if the prime contractor has reported itself to a contracting officer in accordance with paragraph (c)(5) of this section on three occasions within a 12 month period.

(b) Responsibilities of prime contractors. (1) Prime contractors (including small business prime contractors) selected to receive a Federal contract that exceeds the simplified acquisition threshold, that will not be performed entirely outside of any state, territory, or possession of the United States, the District of Columbia, or the Commonwealth of Puerto Rico, and that is not for services which are personal in nature, are responsible for ensuring that small business concerns have the maximum practicable opportunity to participate in the performance of the contract, including subcontracts for

subsystems, assemblies, components, and related services for major systems, consistent with the efficient performance of the contract.

* * *

(3) * * *

(ii) Conducting market research to identify small business subcontractors and suppliers through all reasonable means, such as performing online searches via the System for Award Management (SAM) (or any successor system), posting Notices of Sources Sought and/or Requests for Proposal on SBA's SUB-Net, participating in Business Matchmaking events, and attending pre-bid conferences;

* * * * *

(c) Additional responsibilities of large prime contractors. (1) In addition to the responsibilities provided in paragraph (b) of this section, a prime contractor selected for award of a contract or contract modification that exceeds \$650,000, or \$1,500,000 in the case of construction of a public facility, is responsible for the following:

* * * * *

(iii) The contractor may not prohibit a subcontractor from discussing any material matter pertaining to payment or utilization with the contracting officer;

(iv) When developing an individual subcontracting plan (also called individual contract plan), the contractor must decide whether to include indirect costs in its subcontracting goals. If indirect costs are included in the goals, these costs must be included in the Individual Subcontract Report (ISR) in www.esrs.gov (eSRS) or Subcontract Reports for Individual Contracts (the paper SF-294, if authorized). If indirect costs are excluded from the goals, these costs must be excluded from the ISRs (or

SF-294 if authorized); however, these costs must be included on a prorated basis in the Summary Subcontracting Report (SSR) in the eSRS system. A contractor authorized to use a commercial subcontracting plan must include all indirect costs in its SSR;

(v) The contractor must assign each subcontract the NAICS code and corresponding size standard that best describes the principal purpose of the subcontract (see § 121.410). The prime contractor may rely on subcontractor self-certifications made in SAM (or any successor system), if the subcontract contains a clause which provides that the subcontractor verifies by submission of the offer that the size or socioeconomic representations and certifications in SAM (or any successor system) are current, accurate and complete as of the date of the offer for the subcontract. A prime contractor or subcontractor may not require the use of SAM (or any successor system) for purposes of representing size or socioeconomic status in connection with a subcontract;

(vi) The contractor must submit timely and accurate ISRs and SSRs in eSRS (or any successor system), or if information for a particular procurement cannot be entered into eSRS (or any successor system), submit a timely SF-294, Subcontracting Report for Individual Contract. When a report is rejected by the contracting officer, the contractor must make the necessary corrections and resubmit the report within 30 days of receiving the notice of rejection;

(vii) The contractor must cooperate in the reviews of subcontracting plan compliance, including providing requested information and supporting documentation reflecting actual achievements and good-faith efforts to meet the goals and other elements in the subcontracting plan;

(viii) The contractor must provide pre-award written notification to unsuccessful small business offerors on all subcontracts over \$150,000 for which a small business concern received a preference. The written notification must include the name and location of the apparent successful offeror and if the successful offeror is a small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, or women-owned small business; and

(ix) As a best practice, the contractor may provide the pre-award written notification cited in paragraph (c)(1)(viii) of this section to unsuccessful and small business offerors on subcontracts at or below \$150,000 and should do so whenever practical.

* * * * *

(3) An offeror must represent to the contracting officer that it will make a good faith effort to acquire articles, equipment, supplies, services, or materials, or obtain the performance of construction work from the small business concerns that it used in preparing the bid or proposal, in the same scope, amount, and quality used in preparing and submitting the bid or proposal. Merely responding to a request for a quote does not constitute use in preparing a bid or offer. An offeror used a small business concern in preparing the bid or proposal if:

(i) The offeror references the small business concern as a subcontractor in the bid or proposal or associated small business subcontracting plan;

(ii) The offeror has a subcontract or agreement in principle to subcontract with the small business concern to perform a portion of the specific contract; or

(iii) The small business concern drafted any portion of the bid or proposal or the offeror used the small business concern's pricing or cost information or technical expertise in preparing the bid or proposal, where there is written evidence (including e-mail) of an intent or understanding that the small business concern will be awarded a subcontract for the related work if the offeror is awarded the contract.

(4) If a prime contractor fails to acquire articles, equipment, supplies, services or materials or obtain the performance of construction work as described in (c)(3), the prime contractor must provide the contracting officer with a written explanation. This written explanation must be submitted to the contracting officer prior to the submission of the invoice for final payment and contract close-out.

(5) A prime contractor shall notify the contracting officer in writing if upon completion of the responsibilities of the small business subcontractor (i.e., the subcontractor is entitled to payment under the terms of the subcontract), the prime contractor pays a reduced price to a small business subcontractor for goods and services provided for the contract or the payment to a small business subcontractor is more than 90 days past due under the terms of the subcontract for goods and services provided for the contract and for which the Federal agency has paid the prime contractor. "Reduced price" means a price that is less than the price agreed upon in a written, binding contractual document. The prime contractor shall include the reason for the reduction in payment to or failure to pay a small business subcontractor in any written notice.

(6) If at the conclusion of a contract the prime contractor did not meet all of the small business subcontracting goals in the subcontracting plan, the prime contractor shall provide the contracting officer with a written explanation as to why it did not meet the

goals of the plan so that the contracting officer can evaluate whether the prime contractor acted in good faith as set forth in paragraph (d)(3) of this section.

(d) Contracting officer responsibilities. The contracting officer (or administrative contracting officer if specifically delegated in writing to accomplish this task) is responsible for evaluating the prime contractor's compliance with its subcontracting plan, including:

(1) Ensuring that all contractors submit their subcontracting reports into the eSRS (or any successor system) or, if applicable, the SF-294, Subcontracting Report for Individual Contracts, within 30 days after the report ending date (e.g., by October 30th for the fiscal year ended September 30th).

(2) Reviewing all ISRs, and where applicable, SSRs, in eSRS (or any successor system) within 60 days of the report ending date (e.g., by November 30th for a report submitted for the fiscal year ended September 30th) and either accepting or rejecting the reports in accordance with the Federal Acquisition Regulation (FAR) provisions set forth in 48 CFR subpart 19.7, 52.219-9, and the eSRS instructions (www.esrs.gov). The authority to acknowledge or reject SSRs for commercial plans resides with the contracting officer who approved the commercial plan. If a report is rejected, the contracting officer must provide an explanation for the rejection to allow prime contractors the opportunity to respond specifically to perceived deficiencies.

(3) Evaluating whether the prime contractor made a good faith effort to comply with its small business subcontracting plan. Evidence that a large business prime contractor has made a good faith effort to comply with its subcontracting plan or other subcontracting responsibilities includes supporting documentation that:

(i) The contractor performed one or more of the actions described in paragraph (b) of this section, as appropriate for the procurement;

(ii) Although the contractor may have failed to achieve its goal in one socioeconomic category, it over-achieved its goal by an equal or greater amount in one or more of the other categories; or

(iii) The contractor fulfilled all of the requirements of its subcontracting plan.

(4) Evaluating the prime contractor's written explanation concerning the prime contractor's failure to use a small business concern in performance in the same scope, amount, and quality used in preparing and submitting the bid or proposal, and considering that information when rating the contractor for past performance purposes.

(5) Evaluating the prime contractor's written explanation concerning its payment of a reduced price to a small business subcontractor for goods and services upon completion of the responsibilities of the subcontractor or its payment to a subcontractor more than 90 days past due under the terms of the subcontract for goods and services provided for the contract and for which the Federal agency has paid the prime contractor, and considering that information when rating the contractor for past performance purposes.

(6) Evaluating whether the prime contractor has a history of unjustified untimely or reduced payments to subcontractors, and if so, recording the identity of the prime contractor in the Federal Awardee Performance and Integrity Information System (FAPIIS), or any successor database.

(7) In his or her discretion, requiring the prime contractor (other than a prime contractor with a commercial plan) to update its subcontracting plan when an option is exercised.

(8) Requiring the prime contractor (other than a contractor with a commercial plan) to submit a subcontracting plan if the value of a modification causes the value of the contract to exceed the subcontracting plan threshold and to the extent that subcontracting opportunities exist.

(9) In his or her discretion, requiring a subcontracting plan if a prime contractor's size status changes from small to other than small as a result of a size recertification.

(10) Where a subcontracting plan is amended in connection with an option, or added as a result of a recertification or modification, the changes to any existing plan are for prospective subcontracting opportunities and do not apply retroactively. However, since achievements must be reported on the ISR (or the SF-294, if applicable) on a cumulative basis from the inception of the contract, the contractor's achievements prior to the modification or option will be factored into its overall achievement on the contract from inception.

(e) * * *

(3) Instructing large prime contractors on identifying small business concerns by means of SAM (or any successor system), SUB-Net, Business Matchmaking events, and other resources and tools;

* * * * *

(f) Compliance reviews. (1) A prime contractor's performance under its subcontracting plan is evaluated by means of on-site compliance reviews and follow-up

reviews. A compliance review is a surveillance review that determines a contractor's achievements in meeting the goals and other elements in its subcontracting plan for both open contracts and contracts completed during the previous twelve months. A follow-up review is done after a compliance review, generally within six to eight months, to determine if the contractor has implemented SBA's recommendations.

(2) All compliance reviews begin with a validation of the prime contractor's most recent ISR (or SF-294, if applicable) or SSR. A compliance review includes:

(i) An evaluation of whether the prime contractor assigned the proper NAICS code and corresponding size standard to a subcontract, and a review of whether small business subcontractors qualify for the size or socioeconomic status claimed;

(ii) Validation of the prime contractor's methodology for completing its subcontracting reports; and

(iii) Consideration of whether the prime contractor is monitoring its other than small subcontractors with regard to their subcontracting plans, determining achievement of their proposed subcontracting goals, and reviewing their subcontractors' ISRs (or SF-294s, if applicable).

* * * * *

(g) Subcontracting consideration in source selection. (1) A contracting officer may include an evaluation factor in a solicitation which evaluates:

(i) An offeror's proposed approach to small business subcontracting participation in the subject procurement;

(ii) The extent to which the offeror has met its small business subcontracting plan goals on previous covered contracts; and/or

(iii) The extent to which the offeror timely paid its small business subcontractors under covered contracts.

(2) A contracting officer may include an evaluation factor in a solicitation which evaluates an offeror's commitment to pay small business subcontractors within a specific number of days after receipt of payment from the Government for goods and services previously rendered by the small business subcontractor.

(i) The contracting officer will comparatively evaluate the proposed timelines.

(ii) Such a commitment shall become a material part of the contract.

(iii) The contracting officer must consider the contractor's compliance with the commitment in evaluating performance, including for purposes of contract continuation (such as exercising options).

(3) A small business concern submitting an offer shall receive the maximum score, credit or rating under an evaluation factor described in paragraph (g) of this section without having to submit any information in connection with this factor.

(4) A contracting officer shall include a significant evaluation factor for the criteria described in paragraphs (g)(2)(i) and (g)(2)(ii) of this section in a bundled contract or order as defined in § 125.2.

(5) Paragraph (g) of this section may apply to solicitations for orders against multiple award contracts, (including a Federal Supply Schedule or Multiple Award Schedule contract, a Government-wide acquisition contract (GWAC), or a multi-agency contract (MAC)), blanket purchase agreements or basic ordering agreements.

(h) Multiple award contracts. (1) Except where a prime contractor has a commercial plan, the contracting officer shall require a subcontracting plan for each

multiple award indefinite delivery, indefinite quantity contract (including Multiple Award Schedule), where the estimated value of the contract exceeds the subcontracting plan thresholds in paragraph (a) of this section and the contract has subcontracting opportunities.

(2) Contractors shall submit small business subcontracting reports for individual orders to the contracting agency on an annual basis.

(3) The agency funding the order shall receive credit towards its small business subcontracting goals. More than one agency may not receive credit towards its subcontracting goals for a particular subcontract.

(4) The agency funding the order may in its discretion establish small business subcontracting goals for individual orders, blanket purchase agreements or basic ordering agreements.

Dated: June 25, 2013

Karen G. Mills,
Administrator.

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